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CASE NO.

in the Supreme Court of the United States

October Term, 1989

JOHN P. O'MALLEY and JAMES A. NESBITT
Petitioners,

vs.

FATHER PATRICK H. O'NEILL, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH JUDICIAL CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER A TERMINATION OF EMPLOYMENT FOR REFUSAL TO PARTICIPATE IN A PATTERN OF RACKETEERING IS ACTIONABLE UNDER THE RICO STATUTE

LIST OF PARTIES

Plaintiffs:

John P. O'Malley
James A. Nesbitt

Defendants:

Father Patrick H. O'Neill
St. Thomas University, Inc.
J. Pepe Fanjul
Kenneth Whittaker
Doug Adams
John Allen, M.D.
Jerome Blank
The Reverend Thomas Bogardus, O.S.A
Mike Cameron
Alice Carney
Christina De Heron Noble
The Reverend John E. Deegan, O.S.A
The Reverend John M. Driscoll, O.S.A.
The Very Reverend Joseph Duffey, O.S.A
Ken Jenne
Ken Laurence
Irma Baker Lyons
Eugene F. Malon
Nicolas H. Morley
The Reverend William Murray, O.S.A
Dr. Ricardo Pines
Ken Plante
Evelyn Poole
The Reverend Michael Scanlon, O.S.A
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The opinion of the Court of Appeals is reported: *O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1989). The opinion of the district court is not reported. Both opinions are included in the appendix to this Petition.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The Court of Appeals entered the judgment sought to be reviewed on November 14, 1989, and denied a petition for rehearing and a suggestion for rehearing en banc on January 25, 1990. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1982).

STATUTES INVOLVED

Petitioners filed suit for damages under the Racketeering and Corrupt Influences Act, 18 U.S.C. §§ 1961, *et seq.* (1982), the text of which is reproduced in the Appendix to this Petition.

STATEMENT OF THE CASE

John P. O'Malley and James A. Nesbitt, Plaintiffs and Appellants below, petition this Court to issue a Writ of Certiorari to quash the Eleventh Circuit Court of Appeals' affirmance of the dismissal of their complaint for racketeering. The Court of Appeals held that a termination of employment for refusal to participate in a pattern of racketeering is not actionable under the RICO statute, 18 U.S.C. §§ 1961 *et seq.* (1982).

Statement of the Facts

Plaintiff John P. O'Malley served as vice-president of Academic Affairs and provost at St. Thomas University in Miami, Florida. Plaintiff James A. Nesbitt was Dean of Admissions. The primary defendant, Father Patrick H. O'Neill, was president of St. Thomas. As the Court of Appeals' decision recites:

> O'Malley and Nesbitt discovered that St. Thomas University was operating at a deficit and that O'Neill was concealing its true financial condition through various means. In the course of preparing a budget proposal for the 1986-1987 school year, the plaintiffs learned that O'Neill was concealing a deficit by using restricted federal student assistance funds to offset St. Thomas's operating expenses; and that he was obtaining federal government and private grants requiring matching funds when St. Thomas had no such matching funds available. Further, they learned that O'Neill distorted St. Thomas's financial statements by

basing budget projections on non-existent pledges of financial support. In addition, O'Neill permitted foreign students to attend St. Thomas without visas required by federal law. On one occasion O'Neill asked Nesbitt to send a false verification form to the Immigration and Naturalization Service, but Nesbitt refused.

In August of 1986, O'Malley and Nesbitt confronted O'Neill and urged him to make a full disclosure of the true financial condition of St. Thomas. O'Neill refused to do so, however, and insisted that he would make up the difference through his own fund raising efforts.

After repeated confrontations between plaintiffs and O'Neill over management of St. Thomas, O'Neill sent a letter to O'Malley demanding his resignation. On October 3, 1986, O'Neill terminated Nesbitt. On the same date, at the request of O'Neill, the Board of Trustees, acting through defendants J. Pepe Fanjul and Kenneth Whittaker, again informed O'Malley that he must resign by October 5, 1986, or be terminated. When he refused to submit his resignation, he was terminated.

The district court ordered Plaintiffs to file a "RICO Case Statement"[1] and after Plaintiffs complied dismissed all claims. The district court ruled that Plaintiffs lacked proof of the predicate acts of mail fraud, and that plaintiffs lacked standing to assert a RICO claim because their only injury, loss of employment, was indirect.

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[1]The district court in requiring Plaintiffs to submit a "RICO Case Statement" propounded questions which had been used first in district courts in Louisiana. *See MGM Ins. Assoc's v. Atlantic Apparel Contractors Assoc'n*, Slip op., E.D. Pa. No. 87-417, Oct. 5, 1987; *Babst v. Morgan Keegan & Co.*, slip op., E.D. La. No. 86-5614, Aug. 6, 1987, later opinion, 687 F. Supp. 255 (E.D. La. 1988); *Sopis v. Tsagaris*, slip op., S.D.N.Y. 85 Civ. 0215, July 23, 1987; *McLemore v. Landry*, 668 F.Supp. 531 (M.D. La. 1987); *R.M. Perez & Assoc's v. Welch*, slip op., E.D. La. No. 85-3263, May 14, 1987; *Kings Square Partnership v. South S & L Assoc'n*, slip op., E.D. La. No. 86-2534, April 15, 1987; *Osborne v. Fontainebleau Fed. S & L*, slip op., E.D. La. No. 86-4849, March 25, 1987; *King v. Patten Construction Co.*, slip op., E.D. La. No. 85-5303, Dec. 10, 1986. Other courts have since followed the same procedure. *See Michael's Building Co. v. Ameritrust Co.*, 848 F.2d 674 (6th Cir. 1988); *see Jae-soo Yang Kim v. Pereira Inc.*, 694 F. Supp. 200 (E.D. La. 1988); *Davis v. A. G. Edwards & Sons, Inc.*, 687 F. Supp. 266 (W.D. La. 1988); *Blue Line Coal Company, Inc., v. Equibank*, 683 F. Supp. 493 (E.D. Pa. 1988). Plaintiffs complained in the Court of Appeals that the district court had used the "RICO Case Statement" to require Plaintiffs to "prove" their case without the benefit of discovery. The Court of Appeals, because of its holding on the standing issue, expressly did not address this issue.

The Court of Appeals agreed that the Plaintiffs' injuries were indirect:

> Neither in their complaint nor in their RICO Case Statement do plaintiffs demonstrate that they were injured by the alleged acts of mail fraud. Instead, they allege that their injury arose as a result of their refusal to participate in or to conceal the fraudulent scheme. Therefore, by their own allegations, the proximate cause of the plaintiffs' injuries was O'Neill's decision to fire them for refusing to participate in or to conceal the scheme — not the mail fraud scheme itself.

The Court of Appeals acknowledged that previously, in *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), it had affirmed the dismissal of a RICO claim by a discharged employee *because* the employee was not fired for refusing to participate in racketeering activity:

> This court, in affirming the district court's dismissal of his RICO claim, said:
>
> > Morast was not fired because he refused to participate in the bank's illegal scheme; therefore, Morast's injury, his discharge, did not flow directly from the predicate acts, the defendants' banking violations.
>
> *Morast*, in a footnote, noted that *Callan v. State Chemical Mfg. Co.*, 584 F.Supp. 619 (E.D. Pa. 1984) was 'inapposite because the plaintiffs in *Callan*, unlike Morast, were fired because they refused to participate in the illegal company policy.'

The court, however, rejected its recognition in *Morast* that a discharge of employment based on a refusal to participate in a pattern of racketeering activity would be actionable under the RICO statute:

> The Morast court did not have before it the issue we now address. We hold that there is no principled difference between a discharge for refusal to participate in the predicate acts alleged and a retaliatory discharge for reporting such illegal activity. In either case the injury does not flow directly from the predicate acts.

Judge Anderson filed a special concurrence. Judge Anderson agreed with the majority that there was no distinction between a retaliatory discharge and a discharge for refusal to participate in illegal conduct. Judge Anderson, however, wrote:

> Because I doubt that *Morast* and the result in this case are faithful to *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 & n. 15, 105 S.Ct. 3275, 3285 & n. 15, 87 L.Ed.2d 346 (1985), I concur in the result only.

REASONS FOR ALLOWING THE WRIT

The Court of Appeals' holding that "a discharge for refusal to participate in . . . predicate acts" is not actionable under RICO because "the injury does not flow directly from the predicate acts" turns on its head this

Court's decision in *Sedima S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985).

Before *Sedima*, lower courts struggled to limit RICO. Like the Second Circuit in *Sedima*, courts showed "distress at the 'extraordinary, if not outrageous,' uses to which civil RICO has been put." Some lower courts restricted RICO civil actions by requiring some sort of "racketeering injury," beyond the "direct injury" from the predicate acts themselves. *See* 473 U.S. at 486 n.6.

This Court rejected that restrictive reading. This Court declared, "RICO is to be read broadly." 473 U.S. at 497. This Court did not hold, as the Court of Appeals here has held, that RICO *requires* some sort of ill-defined "direct injury." This Court instead recognized that, to borrow the Court of Appeals' phrase here, there is "no principled difference" between "direct injury" and "indirect injury":

> The [Second Circuit's] statement that the plaintiff must seek redress for an injury caused by conduct that RICO was designed to deter is unhelpfully tautological . . . The court below is not alone in struggling to define "racketeering injury," and the difficulty of that task itself cautions against imposing such a requirement.
>
> We need not pinpoint the Second Circuit's precise holding, for we perceive no distinct "racketeering injury" requirement. Given that "racketeering activity" consists of no more and no less than commission of a predicate act, §

> 1961(1), we are initially doubtful about a requirement of a "racketeering injury" separate from the harm from the predicate acts. A reading of the statute belies any such requirement. Section 1964(c) authorizes a private suit by "[a]ny person injured in his business or property by reason of a violation of § 1962." Section 1962 in turn makes it unlawful for "any person" — not just mobsters — to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity. §§ 1962(a)-(c). If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). There is no room in the statutory language for an additional, amorphous "racketeering injury" requirement.

473 U.S. at 494. The Court stated, "any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts." 473 U.S. at 497. The Court explained in a footnote:

> *Such damages include, but are not limited to,* the sort of competitive injury for which the dissenters would allow recovery.[2] Under the

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[2]Justice Marshall's dissent, for himself and three other Justices, offered examples of "racketeering injury."

(continued . . .)

dissent's reading of the statute, the harm proximately caused by the forbidden conduct is not compensable, but that ultimately and indirectly flowing therefrom is. We reject this topsy-turvy approach, finding no warrant in the language or the history of the statute for denying recovery thereunder to "the direct victims of the [racketeering] activity," post, at 522, while preserving it for the indirect. *Even the court below was not that grudging. It would apparently have allowed recovery for both the direct and the ultimate harm flowing from the defendant's conduct*, requiring injury "not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter." (emphasis added).

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[2](. . . continued)

If a "racketeer" infiltrates and obtains control of a legitimate business either through fraud, foreclosure on usurious loans, extortion, or acceptance of business interests in payment of gambling debts, the honest investor who is thereby displaced could bring a civil RICO action claiming infiltration injury resulting from the infiltrator's pattern of predicate acts that enabled him to gain control. Thereafter, if the enterprise conducts its business through a pattern of racketeering activity to enhance its profits or perpetuate its economic power, competitors of that enterprise could bring civil RICO actions alleging injury by reason of the enhanced commercial position the enterprise has obtained from its unlawful acts, and customers forced to purchase from sponsored suppliers could recover their added costs of doing business.

473 U.S. at 497 n.15.

The Court in *Sedima*, in allowing recovery for "direct injuries," was rejecting, and not imposing, limits on RICO:

> The dissent would also go further than did the Second Circuit in its requirement that the plaintiff have suffered a competitive injury. Again, as the court below stated, Congress "nowhere suggested that actual anti-competitive effect is required for suits under the statute." *Ibid.* The language it chose, allowing recovery to "[a]ny person injured in his business *or property*," § 1964(c) (emphasis added), applied to this situation, suggests that the statute is not so limited.

473 U.S. at 497 n.15.

The Court expressly based this expanded application of RICO on the legislative intent and history:

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, *see United States v. Turkette*, 452 U.S. 576, 586-587 (1981), but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," Pub. L. 91-452, § 904(a), 84 Stat. 947. The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity.

493 U.S. at 497-498.

As the Court of Appeals recognized, 887 F.2d at [1557] n. 6, "some courts have held that indirect injury is sufficient to confer standing."

In *Alexander Grant and Co. v. Tiffany Industries Inc.*, 742 F.2d 408 (8th Cir. 1984), vacated, 473 U.S. 922 (1985) (for reconsideration in light of *Sedima*), *on remand*, 770 F.2d 717 (8th Cir. 1985) (adhering to original result), *cert. denied*, 474 U.S. 1058 (1986), the Court recognized, both before and after *Sedima*, that a direct injury solely from the predicate acts is not required.

In the original opinion, the Eighth Circuit aligned itself with those courts requiring "racketeering enterprise injury." The court held, however, that the plaintiff, an accounting firm which was denied payment for its services because of its clients' mail fraud scheme, suffered racketeering injury:

> We need not further consider the nature of a racketeering enterprise injury, however, for it is clear that Grant's complaint does not simply allege injury from the underlying predicate acts. It contends that Tiffany was conducted through a pattern of mail and wire fraud that enabled it to remain in business. As a result of this extended life, Grant continued to provide its accounting services to Tiffany for a time greater than it would have had the fraud not occurred. This also increased the harm resulting to Grant's business reputation. We

> conclude that these allegations sufficiently plead an injury "by reason of" a RICO violation.

After this Court decided *Sedima* and then remanded *Tiffany* for reconsideration, the Eighth Circuit adhered to the same result:

> Point two of our earlier opinion in Grant is contrary to *Sedima* in that we accepted that some type of "racketeering enterprising injury" was necessary but declined to further define the nature of such an injury because we found it "clear that Grant's complaint does not simply allege injury from the underlying predicate acts." Accordingly, that discussion and holding essentially have been overruled. Since, however, our error was in requiring that Grant allege more than the Supreme Court has now said a plaintiff must allege in order to state a civil RICO claim, we believe our ultimate directive was the proper one: Grant is entitled to pursue its allegations on the merits.

770 F.2d at 718. This Court then denied Tiffany's petition for certiorari. 474 U.S. 1058.

In *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 772 F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986), defendants argued for dismissal because the plaintiff homeowners' association "does not allege that it was the target of the alleged mail fraud and since the alleged injury is only indirectly related to the mail

fraud." Citing its opinions in *Tiffany*, the court stated that "standing to pursue a RICO action exists even though the plaintiff does not allege that it was a target of the racketeering'activity and even though the plaintiff only alleges that it suffered indirect Terre du Lacinjury."

The Second Circuit addressed the sufficiency of "indirect injury" in Sperber v. Boesky, 849 F.2d 60 (2d Cir. 1988). The court affirmed the dismissal of a claim which alleged insider trading by Ivan Boesky and charged that plaintiffs had been "damaged as a result of their investment decisions to invest in takeover companies whose prices were artificially inflated as a result of the unlawful activities of [Boesky] and his reputation, falsely created and maintained."

The Second Circuit stated that this Court in *Sedima* "did not focus on the issue raised by this appeal: to what extent are damages caused only indirectly by the predicate acts recoverable?" The Second Circuit noted that the Eighth Circuit had dealt with the issue in *Tiffany* and that the Second Circuit's opinion in *Sedima* (which was reversed by the Supreme Court) "had held (by analogy to the antitrust-injury requirement of the Clayton Act), that civil RICO allowed recovery only for damages caused by 'racketeering injury'—an injury 'not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter,' like the infiltration of the legitimate economy by racketeers."

The Second Circuit reviewed the majority and dissenting opinions in *Sedima* and concluded that *both* indirect, "racketeering injury" and "direct injury" are cognizable under RICO.[3] The court then evaluated the injuries plaintiffs there alleged and held they had not suffered a cognizable "indirect injury."[4]

[3]The Second Circuit explained:

> Justices Marshall, Brennan, Blackmun and Powell dissented in Sedima because they would have allowed recovery only for racketeering injury. They reasoned that "Congress' concern was not for the direct victims . . . whom state and federal law already protected, but for the competitors and investors whose businesses and interests are harmed . . . or whose competitive positions decline because of infiltration in the relevant market." 473 U.S. at 519 (Marshall, J., dissenting). The majority evidently agreed that at least some kinds of indirect injury are recoverable, since they stated that "damages include, but are not limited to, the sort of competitive injury for which the dissenters allow recovery." 473 U.S. 497, n. 15. However, the facts of Sedima did not require either the majority or the dissent to consider the limits on either direct or indirect recovery.

[4]As the Second Circuit explained:

> [P]laintiffs' allegation is open to two interpretations. One reading is that Boesky's reputation as a financial wizard was obtained by his various illegal (racketeering) activities and was such that his purchases of the six stocks drove up their prices. A second reading of the allegation is that Boesky's (illegal) investment success made all takeover stocks more expensive because it encouraged more people to enter the market in attempts to duplicate his success. Under either of these theories, plaintiffs claim to have paid a price inflated by Boesky's racketeer-created reputation. However, they do not claim to have suffered a loss until the price fell, presumably because until the fall they could have recovered their capital by selling at the still-inflated price.

In *Williams v. Hall*, 683 F.Supp. 639 (E.D. Ky. 1988), the court adopted plaintiffs' argument that even if their discharge were not a cognizable "predicate act," their discharge was a part of a cover-up, which was therefore an overt act in furtherance of a conspiracy which included prohibited predicate acts. The court noted a conflict of decisions, including *Morast*, but said the conspiracy made it unnecessary to resolve the conflict:

> This division of authority seems to reflect a disagreement among the circuits as to whether a plaintiff may sue under § 1962(a) or (c) on the basis of an indirect injury from the predicate acts. The Sixth Circuit seems to be leaning toward the view that indirect injury is sufficient. But the language of the Supreme Court [in *Sedima*] is not clear as to whether indirect injury is sufficient. Although the matter is not free from doubt, the logical conclusion from the opinion of the Court in *Sedima* is that indirect injury is a sufficient basis for a RICO claim under § 1962(a) or (c).

See also Komm v. McFliker, 662 F.Supp. 924 (W.D. Mo. 1987):

> [In] some forums it has been ruled that a whistle blower discharge is only indirectly caused by the pattern of illegal conduct alleged and therefore is not susceptible to RICO relief. [citing *Morast*] The district court in the Bert Lance case noted disagreement with Eighth Circuit law which was deemed to be contrary.

> But the Eighth Circuit seems to be holding firm in allowing RICO recoveries when the illegal conduct has indirectly harmed the plaintiff. *Terre du LacTerre du Lac Ass'n., Inc. v. Terre du Lac, Inc.*, 772 F.2d 467, 473 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 1460 [1461 (1986).
>
> Therefore, although plaintiff does not claim that he was terminated for refusing to act illegally . . ., he does now allege a claim for which he could apparently receive relief in this Circuit, under RICO.

Even the Eleventh Circuit had once recognized that a termination of employment for refusal to participate in a pattern of racketeering would be actionable. In *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), the court affirmed the dismissal of a racketeering claim in what the court viewed as a case of retaliatory discharge. Morast argued "that the only way defendants could continue their illegal scheme was to rid the bank of those people who would not 'go along' with the plan." 807 F.2d at 933. But the Eleventh Circuit, based on Morast's own allegation that his discharge was "purely in retaliation . . .," 807 F.2d at 929, recognized that the facts would not support his argument. The Court concluded that "Morast was not fired because he refused to participate in the Bank's illegal scheme; therefore, Morast's injury, his discharge, did not flow directly from the predicate acts, the Defendants' banking violations." 807 F.2d at 933. The Court distinguished *Callan v. State Chemical Manufacturing Company*, 584 F.Supp. 619 (E.D. Pa. 1984), "because the Plaintiffs in *Callan*, unlike Morast, were fired because they refused to participate in the illegal company policy." 807 F.2d at 933 n.8.

The Court of Appeals here opined that "there is no principled difference between a discharge for refusal to participate in the predicate acts alleged and a retaliatory discharge for reporting such illegal activity." Petitioners submit there is a substantive difference. The victim of "a discharge for refusal to participate in the predicate acts" and the victim of a "retaliatory discharge for reporting such illegal activity" both suffer injury to their business or property as a result of a pattern of racketeering activity. But the victim of "a discharge for refusal to participate in the predicate acts" must choose between losing his or her job and *participating* in an illegal scheme. The victim of a "retaliatory discharge for reporting such illegal activity" is never in a position of having to choose between acting illegally and keeping his or her job. The RICO statute imposes no affirmative obligation to report suspected racketeering activity; it forces no one to "blow the whistle." It obviously prohibits the racketeering activity, however, and the person who loses employment for refusing to participate in a racketeering scheme is a clear and direct victim of that scheme.

Petitioners further submit that, as suggested by Judge Anderson's special concurrence below, *Morast* and the decision below are both contrary to *Sedima*. There is no principled difference between "direct injury" and "indirect injury." There is no principled reason to deny recovery to persons who lose their job because they refuse to join their employers in illegal schemes. If those persons are not injured "directly" by a predicate act, they are surely injured by the fact that a "pattern" is ongoing.

The Petitioners' position here does not stretch the reach of RICO. Indeed, Petitioners submit, their case illustrates the type of "racketeering activity" courts struggled to define before *Sedima*. Petitioners may not have been direct victims of mail fraud. Victims of mail fraud have other remedies — the government can prosecute for the mail fraud itself, and the victims can recover damages for common law fraud. These Petitioners, on the other hand, were victims of a pattern of racketeering activity.

If only those persons who have sustained cognizable damages from the predicate acts have standing under RICO, then the statute adds nothing to civil remedies other than a trebling of otherwise available damages. The language and the legislative history of the statute, as reviewed in *Sedima*, show otherwise: RICO was intended to provide these Petitioners, and other persons similarly situated, with a remedy.

CONCLUSION

This Court should grant certiorari and hold that an employee discharged for refusal to participate in a pattern of racketeering activity has a claim for damages under the racketeering statute.

Respectfully submitted,

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Appendix

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

DISTRICT COURT'S "MEMORANDUM OPINION" 1

OPINION BY COURT OF APPEALS 11

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT 27

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-2252-CIV-SCOTT

(NOTE: THIS ORDER NOT FILED UNDER SEAL)

THE REVEREND FATHER JOHN P. O'MALLEY, O.S.A., individually, and JAMES A. NESBITT, individually,

Plaintiffs,

-vs-

THE REVEREND FATHER PATRICK H. O'NEILL, O.S.A., et al.,

Defendants.

MEMORANDUM OPINION

THIS CAUSE is before the Court for a review of Plaintiffs' RICO Case Statement, as well as Defendants' responses thereto, filed pursuant to the Court's Order of December 22, 1987. We required Plaintiffs to file such a statement in response to the Court's expressed concern over the tenuous nature of Plaintiffs' racketeering and conspiracy allegations, 18 U.S.C. 1962(c) and (d) (RICO), the only basis for this Court's subject matter jurisdiction. *See*, Order of December 22, 1987. As noted in that Order, the Court has wavered over whether Plaintiffs have stated a cause of action for a RICO violation. Initially, Defendants successfully argued that

a claim was not stated in Plaintiffs' original complaint and it was accordingly dismissed. Later, in an unusual display of caution by the Court, we denied Defendants' renewed motions to dismiss and required Plaintiffs to file a RICO Case Statement, specifically detailing the factual allegations supporting their RICO claims. The Court now undertakes the arduous task of sifting through the voluminous allegations contained in that statement and Defendants' responses. If the outcome of this case were based solely upon the quantity of pages submitted by the litigants, Plaintiffs would surely succeed in persuading the Court of their position, however, the Court must delve deeper in its analysis of Plaintiffs' RICO claims. Upon such an analysis, it is clear that Plaintiffs' RICO Case Statement is devoid of any of the necessary elements to support their claim of a pattern of racketeering activity against the Defendants nor are the allegations sufficient to support Plaintiffs' claim of mail fraud, the underlying predicate act.

THE CLAIMS

Plaintiffs, the Reverend Father John P. O'Malley, O.S.A., and James A. Nesbitt, bring this action against the Reverend Father Patrick H. O'Neill, O.S.A., J. Pepe Fanjul, Kenneth Whittaker, St. Thomas of Villanova University (hereinafter St. Thomas University) and nine other trustees of St. Thomas University[1] for damages

[1]Father O'Neill is being sued in his individual capacity; J. Pepe Fanjul as well as Kenneth Whittaker are being sued both individually and as members of the Board of Trustees of St. Thomas. The nine trustees are not being sued individually but solely in their positions as trustees of St. Thomas.

and equitable relief[2] arising out of alleged violations of 18 U.S.C. § 1962(c) and (d) (RICO and RICO conspiracy respectively). The amended complaint alleges that Defendants committed and conspired to commit mail fraud, a predicate act under RICO. Specifically, Plaintiffs allege that they were fired from their high ranking administrative positions at St. Thomas University in retaliation for their failure to go along with the Defendants' scheme to conceal a financial crisis at the school and the illegal use of school and federal funds. Defendants, on the other hand, characterize this action as a "bitter grudge match between competing factions vying for control of the University. With this brief synopsis, we turn to the litigants' legal arguments.

LEGAL ANALYSIS

Count I of Plaintiffs' amended complaint alleges federal RICO violations against Father O'Neill. In order to sustain a claim for a RICO violation, Plaintiffs must demonstrate that Father O'Neill committed at least two predicate offenses constituting a pattern of racketeering activity. *United States v. Weinstein*, 762 F.2d 1522 (11th Cir. 1985). RICO defines these predicate acts as any of those indictable federal offenses enumerated in § 1961(1). Plaintiffs here concede that the only predicate acts committed by Father O'Neill concern violations of the federal mail fraud statute, 18 U.S.C. 1341. Plaintiffs allege that Father O'Neill engaged in a scheme to commit mail fraud when (1) foreign students were

[2]The nine trustees not sued individually are presumably included in the amended complaint due to Plaintiffs' equitable prayer for relief which seeks an Order from the Court compelling the reinstatement of Plaintiffs to their former positions at the University.

permitted to attend the university without proper visas; (2) Defendants misused matching funds and paid general obligations from restricted student assistance funds; and (3) Father O'Neill mailed false financial statements to creditors and trustees of St. Thomas. In each of these instances, and in furtherance of the purported scheme, Father O'Neill is said to have utilized the U.S. mail in violation of 18 U.S.C. 1341 and interfered with or affected interstate commerce as proscribed by 18 U.S.C. 1961. Plaintiffs' complaint, however, is insufficient in the following respects and it shall thus be dismissed with prejudice: (1) failure to plead a substantive RICO violation; (2) lack of Plaintiffs' standing to assert a RICO violation; and (3) failure to allege the required elements of a RICO conspiracy.

INSUFFICIENCY OF THE PLEADINGS

A mail fraud conviction requires proof of three elements: (1) Father O'Neill's participation in a scheme to defraud; (2) use of the mail in furtherance of the scheme; and (3) Father O'Neill's use of the mails in furtherance of the scheme. *United States v. Haimowitz*, 725 F.2d 1561 (11th Cir. 1984). Notwithstanding the numerous allegations made by Plaintiffs, they have failed to set forth any facts to show a violation by Father O'Neill of the federal mail fraud statute. Plaintiffs have alleged that Father O'Neill permitted foreign students to attend the university without student visas; however, Plaintiffs concede that they are not aware of any false forms filed by Father O'Neill. Plaintiffs simply presume that because there were foreign students on campus who may not have appropriate visas, that forms must have been filed with the federal government. Such vague and

conclusory statements are not sufficient to state a claim for mail fraud and will subject such a claim to dismissal. *KTM Corporation v. Seligman*, 110 F.R.D. 297 (S.D. Fla. 1986). In fact, in order to allege mail fraud, Plaintiffs must state such matters as the time, place and contents of the false representations contained in the mailings. *Doxie v. Ford Motor Credit Co.*, 603 F.Supp 624 (S.C. Ga. 1984). Additionally, Plaintiffs must specify in what respect each of the statements were false and misleading and the factual basis for believing that the defendant acted with an intent to defraud. Id., at 627. Further, and most importantly, any fraud alleged must state with particularity plaintiffs' reliance on these false statements of fact to their detriment. *Blount Financial Services, Inc. v. Walter E. Heller and Company*, 819 F.2d 151 (6th Cir. 1987).

The examples cited by Plaintiff with regard to Father O'Neill allegedly filing false reports concerning matching funds also fail to enumerate any examples of actual mailings by Father O'Neill with an intent to further a scheme to defraud. In no instance have Plaintiffs alleged that they were harmed by any representations contained in these mailings. That there might have been interfund borrowing does not in and of itself constitute mail fraud. At best, Plaintiffs have described a situation of financial difficulty at the University which has no relation to any allegations of mail fraud committed by this Defendant. With regard to those allegations concerning Father O'Neill knowingly causing false financial reports to be mailed to creditors and trustees, Plaintiffs have failed to set forth how Plaintiffs relied on these false financial statements, by whom the statements were prepared and

by whom mailed. They certainly do not allege that Father O'Neill with an intent to further the scheme to defraud mailed these false financial statements. Plaintiffs have thus failed to sufficiently plead a violation of the federal mail fraud statute.

The insufficiency of Plaintiffs' allegations however cannot be cured by a mere amended pleading. A plaintiff in a civil RICO action, when relying on the predicate act of mail fraud, must show proof of loss of tangible property resulting from the defendants' conduct. *McNally v. United States*, 107 S.Ct. 2875 (1987). It is essential that plaintiffs here allege that the scheme defrauded them of money or property. *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987). Plaintiffs here allege that the parties defrauded by the Defendants' alleged mail fraud scheme are the Government, St. Thomas University creditors, students, and the ABA; however, mail fraud does not encompass a scheme directed at defrauding another of intangible rights. *United States v. Gimbel*, supra. In that case, the court held that an indictment charging a scheme which deprived the Government of currency transaction reports and other accurate and truthful information did not state a claim for mail fraud because it did not charge that the scheme deprived the Government of money or property. Similarly, the mailing of a false financial statement which misconstrued the prime rate has not been considered a mail fraud violation. *Blount Financial Services, Inc. v. Walter E. Heller and Company, supra.* Here, Plaintiffs have not proven how the Government, creditors, students or the ABA were defrauded of any money or property as a result of the mailing of the allegedly false INS forms, the alleged misuse of

matching funds, nor the delivery of allegedly false financial statements. Since Plaintiffs nowhere state that the scheme was directed at them, the fact that they may have been deprived of money or property (employment) as a result is completely irrelevant to whether mail fraud was committed.

LACK OF STANDING

For a plaintiff to have standing to assert a RICO cause of action, Plaintiffs must show that: (1) they were asked to participate in a mail fraud violation; (2) they refused to participate in such a scheme; and (3) they were fired as a result of such refusal. *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987). Plaintiffs have amended their complaint to allege that they were fired as a direct result of their refusal to participate in the illegal acts of the Defendants; however, no facts are alleged to support that contention. The only fact alleged is that Plaintiffs were asked to sign one false INS report for one student, the mailing of which Plaintiffs allege constitutes mail fraud. As previously noted, the mailing of the INS form cannot constitute mail fraud under the test of *McNally v. United States*, 107 S.Ct. 2875 (1987). Accordingly, there is no illegal act in which O'Neill could have refused to participate, and so no refusal for which he could have been discharged. In fact, none of the allegations made amount to the Plaintiffs' refusal to participate in any illegal acts for which they were fired. All of their assertions merely parallel the case of *Morast v. Lance, supra*, where the court held that Morast was not fired because he refused to participate in the bank's illegal scheme . . . "rather, he is attempting to use the RICO statutes as a source of recovery for the loss of his job." *Id.*, at 933.

This case is similar to the case of *Nodine v. Textron, Inc.*, 819 F.2d 347, in which the plaintiff discovered his employer routinely violated customs laws reporting requirements. Like the plaintiffs here, Nodine alleged that he attempted to redress his employers' wrongs by reporting the scheme to company superiors. His employer attempted to cover up the scheme, and asked Nodine to change his story, which he refused to do. In affirming that dismissal, the First Circuit directly addressed the question of whether the defendants' RICO violations caused the plaintiff's injury or his discharge. The Court stated that plaintiff's injury resulted from defendant's decision to fire him after he reported the customs scheme to his superior. Here, as in *Nodine*, the alleged predicate act of mail fraud did not harm Plaintiffs in their business or property. Although the firings of the Plaintiffs under these circumstances may have been wrong, Defendant's actions do not amount to a RICO violation.

FAILURE TO PLEAD RICO CONSPIRACY

Plaintiffs assert in Count II (RICO Conspiracy) that St. Thomas University, and trustees, Fanjul and Whittaker, conspired with Father O'Neill to commit violations of the Federal RICO Act. For any of these Defendants to be charged with RICO conspiracy, however, there must be some substantive RICO violation that they conspired to commit. In other words, the RICO conspirators must have agreed to participate in the commission of two predicate acts of mail fraud. *United States v. Elliott*, 571 F.2d 533 (5th Cir. 1986). Plaintiffs have not alleged that these Defendants agreed

to participate in the commission of mail fraud; what they do allege is that each of these Defendants "adopted the unlawful acts of the others as their own." These allegations are insufficient to show that both a conspiracy existed and that the actions at issue were taken in furtherance of that conspiracy. *United States v. Manzella*, 782 F.2d 533 (5th Cir. 1986). The mere conclusory allegation of a conspiracy with no supporting factual averments is insufficient to state a claim for conspiracy. *Barger v. State of Kansas*, 620 F.Supp. 1432 (D. Kan. 1985). Accordingly, this Count is also dismissed.

CONCLUSION

Based on this analysis, the Court dismisses all Counts alleging federal RICO violations (regardless of the parties named in those counts) with prejudice. Further, the Court finds that it lacks jurisdiction to decide the remaining pendent claims. Accordingly, these counts are dismissed without prejudice based on lack of jurisdiction so that they can be properly litigated in the state court.

DONE AND ORDERED in Chambers at Miami, Florida, this 9 day of June, 1988.

/s/
THOMAS E. SCOTT
UNITED STATES
DISTRICT JUDGE

cc: Counsel of record

The Reverend Father John P. O'Malley, O.S.A., individually, and James A. Nesbitt, individually, Plaintiffs-Appellants, v. The Reverend Father Patrick H. O'NEILL, O.S.A., et al., Defendants-Appellees

No. 88-5572

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

887 F.2d 1557

November 14, 1989

APPEAL-STATEMENT:

Appeal from the United States District Court for the Southern District of Florida, No. 86-2252-CIV-TES, Judge Scott.

COUNSEL:

Jesse C. Jones, BAILEY & HUNT, Kathy J. Bible, Joel S. Perwin, PODHURST, ORSECK, PARKS, et al., Miami, Florida, for Plaintiffs-Appellants.

Love Phipps, CORLETT, KILLIAN, HARDEMAN, McINTOSH & LEVI, Miami, Florida, for St. Thomas University.

Robert M. Klein, STEPHENS, LYNN, KLEIN & McNICHOLAS, P.A., Miami, Florida, for O'Neill.

OPINION:

Before ANDERSON and COX, Circuit Judges, and SHOOB,* District Judge.

COX, Circuit Judge.

This is an appeal from a dismissal for failure to state a claim. The plaintiffs, The Reverend Father John P. O'Malley, O.S.A., and James A. Nesbitt, brought suit against The Reverend Father Patrick H. O'Neill, O.S.A., St. Thomas of Villanova University, the Board of Trustees of St. Thomas University, and two of the trustees in their individual capacities, for damages and equitable relief arising from alleged violations of the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. § 1961 et seq. The plaintiffs claim that they were fired for their refusal to participate in or continue to conceal a mail fraud scheme. The district court held that the plaintiffs lacked standing to assert a RICO claim because their only injury, loss of employment, was not caused by the predicate acts of mail fraud. Moreover, the district court found that plaintiffs failed properly to allege the elements of a conspiracy. We agree with the district court, and affirm the dismissal.

I. BACKGROUND

Since the district court dismissed the complaint for failure to state a claim, we will assume the facts alleged by the plaintiffs to be true. Cruz v. Beto, 405 U.S. 319, 322, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263 (1972); Burch v. Apalachee Community Health Services, Inc., 840 F.2d 797, 798 (11th Cir.1988). This case arises from a

*Honorable Marvin H. Shoob, U.S. District Judge for the Northern District of Georgia, sitting by designation.

controversy at St. Thomas of Villanova University, a private educational institution incorporated under Florida law and sponsored by the Province of Saint Thomas of Villanova of the Order of Saint Augustine of the Roman Catholic Church. One plaintiff, Father John P. O'Malley, served as vice-president of Academic Affairs and provost at St. Thomas, and his co-plaintiff, Mr. James A. Nesbitt, was dean of Admissions. The primary defendant, Father Patrick H. O'Neill, was president of St. Thomas.

THE CLAIMS

In describing the plaintiffs' claims, all parties to this appeal have utilized both the complaint filed by the plaintiffs and a "RICO Case Statement" filed by the plaintiffs pursuant to an order entered by the district court. We shall do the same.[3]

O'Malley and Nesbitt discovered that St. Thomas University was operating at a deficit and that O'Neill was concealing its true financial condition through various means. In the course of preparing a budget proposal for the 1986-1987 school year, the plaintiffs learned that O'Neill was concealing a deficit by using restricted federal student assistance funds to offset St. Thomas's operating expenses; and that he was obtaining federal government and private grants requiring matching funds when St. Thomas had no such matching funds available. Further, they learned that O'Neill distorted St. Thomas's financial statements by basing budget projections on non-existent pledges of financial

[3]No issue is presented on this appeal relative to the propriety of such an order.

support. In addition, O'Neill permitted foreign students to attend St. Thomas without visas required by federal law. On one occasion O'Neill asked Nesbitt to send a false verification form to the Immigration and Naturalization Service, but Nesbitt refused.

In August of 1986, O'Malley and Nesbitt confronted O'Neill and urged him to make a full disclosure of the true financial condition of St. Thomas. O'Neill refused to do so, however, and insisted that he would make up the difference through his own fund raising efforts.

After repeated confrontations between plaintiffs and O'Neill over management of St. Thomas, O'Neill sent a letter to O'Malley demanding his resignation. On October 3, 1986, O'Neill terminated Nesbitt. On the same date, at the request of O'Neill, the Board of Trustees, acting through defendants J. Pepe Fanjul and Kenneth Whittacker, again informed O'Malley that he must resign by October 5, 1986, or be terminated. When he refused to submit his resignation, he was terminated.[4]

The complaint in the district court named as defendants Father O'Neill, St. Thomas University, Fanjul and Whittacker, in their individual capacities, and the remaining nine trustees in their official capacities.[5] The complaint includes four counts, two of

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[4]While we assume these allegations to be true for the purposes of this appeal, they are hotly disputed by the defendants.

[5]The complaint does not seek damages against the trustees sued in their capacity as trustees; as to them it seeks only an order compelling the trustees to reinstate O'Malley and Nesbitt.

which are civil RICO claims."[6] Count I charges O'Neill with a substantive violation of 18 U.S.C. 1962(c) (RICO). Count II alleges a conspiracy among O'Neill, Fanjul, Whittacker and the University in violation of 18 U.S.C. 1962(d) (RICO Conspiracy). The only predicate acts upon which plaintiffs base their RICO claims are alleged acts of mail fraud under 18 U.S.C. 1341 (1982).[7]

For purposes of the analysis in this opinion, we discard the claim of mail fraud based on sending false reports to the Immigration and Naturalization Service ("INS") as non-viable. A plaintiff in a civil RICO action, when relying on the predicate acts of mail fraud, must show proof of loss of tangible property resulting from the defendant's conduct. See McNally v. U.S., 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). The plaintiffs have not alleged that the government was deprived of any money or property by being sent false immigration reports. United States v. Gimbel, 830 F.2d 621 (7th Cir.1987). Thus, because the allegedH scheme of mailing false reports to the INS was directed at depriving the government of merely intangible rights, plaintiffs do not present a cognizable claim of mail fraud.

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[6]The remaining two counts asserted claims under state law for misrepresentation and slander. The district court dismissed these claims without prejudice upon dismissal of the federal claims. The propriety of dismissing the state law claims is not an issue on this appeal.

[7]Mail fraud is included among the predicate acts which may constitute racketeering under 18 U.S.C. § 1961 (1982).

II. DISCUSSION

Count II need not detain us long. The district court dismissed Count II - the RICO conspiracy count — because the allegations of a conspiracy were merely conclusory and unsupported by any factual allegations. Sooner Products Co. v. McBride, 708 F.2d 510, 512 (10th Cir.1983); Barger v. State of Kansas, 620 F.Supp. 1432 (D.Kan.1985). We find that dismissal to be proper. The plaintiffs' complaint and RICO Case Statement allege at most that some of the defendants knew about O'Neill's activities; there are no facts alleged that would indicate that they were willing participants in a conspiracy. United States v. Boldin, 772 F.2d 719, 727 (11th Cir.1985), modified in other grounds, 779 F.2d 618 (11th Cir.), cert. denied, 475 U.S. 1048, 106 S.Ct. 1269, 1498, 1520, 89 L.Ed.2d 577 (1986); United States v. Pepe, 747 F.2d 632, 659 (11th Cir.1984); United States v. Alonso, 740 F.2d 862 (11th Cir.1984). Thus, there is no palpable conspiracy claim.

Count I alleges that O'Neill engaged in a pattern of mail fraud, and that when the plaintiffs refused to participate in or conceal the scheme, they were fired. Two sections of the amended complaint focus on the predicate acts and the injury alleged. They read as follows:

> 17. In furtherance of the scheme described in the preceding paragraph, Father O'Neill has during the past six years engaged in a pattern of mail fraud in violation of 18 U.S.C. 1341, including without limitation the following:

(a) Father O'Neill has permitted students who are not citizens of the United States to attend St. Thomas University and/or Monsignor Edward Pace High School, which is operated by St. Thomas University, without having student visas as required by federal law, and has knowingly caused false reports concealing said facts to be delivered by the United States Postal Service to the federal government.

(b) Father O'Neill has knowingly caused false reports regarding federal grants requiring "matching funds" to be delivered by the United States Postal Service to the federal government without properly accounting for any such matching funds.

(c) Father O'Neill has knowingly caused reports to be delivered by the United States Postal Service to the federal government to obtain financial aid funds from the federal government to be held in escrow and delivered to students as required by federal law with the [*8] fraudulent intent to use said funds for other obligations of St. Thomas University.

(d) Father O'Neill has knowingly caused false financial reports to be delivered by the United States Postal Service to creditors and Trustees of St. Thomas University. . . .

> 46. Plaintiffs, Father O'Malley and Nesbitt, were terminated as a direct result of the wrongful acts alleged in paragraph 17, and would not have been terminated but for the fact that they refused to participate in or continue to conceal those wrongful acts. Plaintiff[s] therefore have been injured in their business and property by the foregoing violations of 18 U.S.C. § 1962(c) and are therefore entitled to treble damages, attorneys' fees, and costs pursuant to 18 U.S.C. § 1964.

The district court dismissed the complaint for failure to state a claim, concluding, among other things, that the plaintiffs lacked standing to assert a RICO claim. The plaintiffs argue on appeal: (1) that they have standing to assert a RICO claim; and (2) that the district court improperly dismissed their claim because of their failure to "prove" their case in their RICO Case Statement. We affirm the district court's dismissal for lack of standing, and therefore need not address plaintiffs' second argument.

The statute at issue, 18 U.S.C. § 1964(c) (1982), reads as follows:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee (emphasis added).

Thus, in order to have standing to sue for damages under section 1964(c) the plaintiffs must show: (1) a violation of section 1962; (2) injury to business or property; and (3) that the violation caused the injury. See Haroco v. American Bank and Trust Co., 747'F.2d 384, 398 (7th Cir.1984), aff'd, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985). We assume that discharge from employment constitutes an injury to "business or property." Nodine v. Textron, Inc., 819 F.2d 347, 348 (1st Cir.1987). We also assume that the complaint sufficiently alleges predicate acts of mail fraud, and focus our attention on the issues of standing and causation.

Section 1964(c) itself provides little guidance as to the precise meaning of the words "by reason of." However, the Supreme Court, in Sedima, S.P.R.L. v. Imrex Co. Inc., 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), discussed this requirement. The Sedima Court concluded that "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." 473 U.S. at 496, 105 S.Ct. at 3285. In other words, "the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern . . . Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts." 473 U.S. at 497, 105 S.Ct. at 3285. The language "by reason of" in section 1964(c) imposes a proximate causation requirement on the plaintiffs. Cullom v. Hibernia Nat'l. Bank, 859 F.2d 1211, 1214 (5th Cir.1988); Morast v. Lance, 807 F.2d 926, 933 (11th Cir.1987); Haroco v. American Bank and Trust, 747 F.2d

at 398; Sperber v. Boesky, 849 F.2d 60, 63 (2d Cir.1988); Cenco v. Seidman [Seidman, 686 F.2d 449, 457 (7th Cir.), cert. denied, 459 U.S. 880, 103 S.Ct. 177, 74 L.Ed.2d 145 (1982).[8]

The plaintiffs allege only predicate acts of mail fraud. Therefore, in order to establish standing, the plaintiffs must show that the defendants' mailing of false reports and statements directly caused them to lose their jobs. The plaintiffs have not established that causal nexus. Neither in their complaint nor in their RICO Case Statement do plaintiffs demonstrate that they were injured by the alleged acts of mail fraud. Instead, they allege that their injury arose as a result of their refusal to participate in or to conceal the fraudulent scheme. Therefore, by their own allegations, the proximate cause of the plaintiffs' injuries was O'Neill's decision to fire them for refusing to participate in or to conceal the scheme — not the mail fraud scheme itself. See Burdick v. American Express Co., 865 F.2d 527, 529 (2d Cir.1989); see also Nodine, 819 F.2d at 349. But see Callan v. State Chemical Mfg. Co., 584 F.Supp. 619, 623 (E.D.Pa.1984).

It may well be true that the commission of the predicate acts constituted the "but for" cause of the firings. However, that tenuous a relation between the harm and the predicate acts is not sufficient to confer standing. Morast, 807 F.2d at 933; Sperber, 849 F.2d

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[8]Some courts have held that indirect injury is sufficient to confer standing. Terre du Lac Ass'n., Inc. v. Terre du Lac, Inc., 772 F.2d 467, 473 (8th Cir.1985), cert. denied, 475 U.S. 1082, 106 S.Ct. 1460 [1461, 89 L.Ed.2d 718 (1986); Komm v. McFliker, 662 F.Supp. 924, 928 (W.D.Mo.1987).

at 63. RICO does not provide a remedy for every injury that may be traced to a predicate act.

Plaintiffs argue that our recent decision in Morast v. Lance, 807 F.2d 926 (11th Cir.1987), holds that persons discharged for refusing to participate in a scheme of mail fraud have standing to sue under section 1964(c). In that case, Morast, an employee of a bank, learned that a director of the bank was committing banking law violations. Morast reported the violations to the Comptroller of the Currency and cooperated in a subsequent investigation. After he was terminated, Morast sued the bank claiming that he was discharged because of a conspiracy in violation of 18 U.S.C. § 1964 and "that the only way defendants could continue their illegal scheme was to rid the bank of those people who would not 'go along' with the plan." Id. at 933. This court, in affirming the district court's dismissal of his RICO claim, said:

> Morast was not fired because he refused to participate in the bank's illegal scheme; therefore, Morast's injury, his discharge, did not flow directly from the predicate acts, the defendants' banking violations.

Morast, in a footnote, noted that Callan v. State Chemical Mfg. Co., 584 F.Supp. 619 (E.D.Pa.1984) was "inapposite because the plaintiffs in Callan, unlike Morast, were fired because they refused to participate in the illegal company policy." 807 F.2d at 933 n. 8. The Morast court did not have before it the issue we now address. We hold that there is no principled difference between a discharge for refusal to participate in the

predicate acts alleged and a retaliatory discharge for reporting such illegal activity. In either case the injury does not flow directly from the predicate acts.

Our conclusion that plaintiffs' injuries do not flow from the acts of mail fraud is supported by other authority which we consider persuasive. In Cullom v. Hibernia Nat'l. Bank, 859 F.2d 1211 (5th Cir.1988), the Fifth Circuit held that even when an employee is discharged for refusing to participate in a RICO mail fraud scheme, he is not injured "by reason of" the commission of the predicate acts, and consequently lacks standing to sue under section 1964(c). Cullom was a top official in Southwest National Bank of Lafayette ("SNB"), which was engaging in merger talks with Hibernia National Bank ("Hibernia"). By virtue of his position, Cullom discovered a fraudulent scheme whereby Hibernia and associated banks would sell and attempt to sell to other banks short term loan participations. Hibernia would sell these loan participations immediately preceding the end of a reporting period'and then buy them back immediately thereafter, thus distorting its financial statements. Hibernia attempted to sell loan participations to SNB. Cullom, concerned about the legality of the transaction, contacted SNB's legal counsel. SNB's legal counsel refused to render an opinion on the matter. Subsequently, when the deal neared completion, Cullom, still concerned about the legality of the transaction, contacted independent legal counsel. Cullom eventually refused to participate in the scheme. The transaction was ultimately abandoned, but SNB's legal counsel encouraged Cullom "not to make waves" about the forlorn deal. Shortly thereafter SNB

demanded and received Cullom's resignation. Cullom then sued Hibernia and SNB alleging that Hibernia and SNB had engaged in or conspired to engage in several counts of mail and securities fraud in violation of RICO. Specifically, Cullom claimed that he was discharged for his refusal to participate in the scheme.[9] Id. at 1213.

The Fifth Circuit noted that Cullom did not allege that his injury flowed from the predicate acts of mail and securities fraud, but rather claimed he was discharged because he refused to participate in the illegal activity. Id. at 1213. The court concluded, therefore, that Cullom's injury resulted from SNB's decision to fire him after he refused to participate in the alleged scheme, not from the predicate acts. In short, Cullom failed to allege the proper causal nexus between his injury and the mail fraud. Id. at 1216.

Additionally, the Cullom court reasoned that Cullom was not the target or victim of the predicate acts of mail fraud. Cullom had alleged in his amended complaint that the victims of the loan participation scheme were the members of the general public who would rely on the inaccurate financial statements to make investment decisions about Hibernia. Because Cullom was not one of those people, he had no standing to sue under RICO.

We find the reasoning in Cullom persuasive. We also find the facts closely analogous to those in the instant case. Like Cullom, the plaintiffs here are high ranking

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[9]When Cullom asked for the reason why SNB demanded his resignation, he was told that the decision was based on his refusal to cooperate in the purchase of the loan participations and for consulting independent counsel. Id. at 1213. Id. at 1213.

officials who learned of an alleged scheme of mail fraud through execution of their duties. Further, just as the plaintiffs allegedly refused to participate in the fraudulent scheme and were told to conceal the operating deficit, so Cullom refused to participate in the loan participation scheme and was advised "not to make waves." Both argue that they were terminated for refusing to participate in a fraudulent scheme. We align ourselves with the Cullom court and hold that the plaintiffs here were fired by reason of O'Neill's decision to have them fired, not because of the commission of the predicate acts. Consequently, the causation requirement contained in section 1964(c) is not satisfied.

We also agree with the Cullom court and other courts that plaintiffs lack standing because they are not the victims or targets of the mail fraud. See Burdick, 865 F.2d at 529; Pujol v. Shearson/Am. Express, Inc., 829 F.2d 1201, 1205 (1st Cir.1987);[10] Diamond v. Reynolds, No. 84-280 1986 WL 15375 (D.Del. July 15, 1986) (LEXIS, Genfed library, Dist. file), aff'd in part and rev'd in part and remanded on other grounds, 853 F.2d 917 (3rd Cir.1988), cert. denied, U.S. , 109 S.Ct. 392, 102 L.Ed.2d 381 (1988). We are not unmindful of contrary authority. Terre du Lac Ass'n., Inc. v. Terre du Lac, Inc., 772 F.2d 467, 472-3 (8th Cir.1985); Alexander Grant and Co. v. Tiffany Industries, Inc.,

[10]Pujol involved a vice president with Shearson who was terminated for refusing to participate in an alleged scheme of mail fraud. Pujol's complaint alleged that Shearson and its agents violated the law by engaging in illegal banking transactions, defrauding investors and furthering the execution of the scheme through the use of the mail and wires. The court found, however, that his injury arose from the actions he took to stop that illegal scheme as opposed to injury from the predicate acts.

742 F.2d 408, 411 nn. 7 & 8 (8th Cir.1984), vacated and remanded for reconsideration in light of Sedima, 473 U.S. 922, 105 S.Ct. 3551, 87 L.Ed.2d 673 (1985) on remand, 770 F.2d 717 (8th Cir.1985) (adhering to original result), cert. denied, 474 U.S. 1058, 106 S.Ct. 799, 88 L.Ed.2d 776 (1986). Plaintiffs do not allege that they, in any way, relied upon the false reports sent to the government or upon the distorted financial statements. See Blount Financial Services, Inc. v. Walter E. Heller and Co., 819 F.2d 151 (6th Cir.1987).[11] The victims of the mail fraud, if there were any, were the federal government and the creditors of St. Thomas and the American Bar Association.[12] Indeed, in their RICO Case Statement, plaintiffs allege that the parties defrauded by the defendants' fraudulent scheme are the government, St. Thomas' creditors, the students and the American Bar Association. Nowhere do the plaintiffs allege that they were the intended victims of the mail fraud scheme. Their injury, therefore, results not "by reason of" the RICO violation, but rather from the tangentially related decision to fire them.

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[11]In Blount, the Sixth Circuit held that in order to properly allege a civil RICO claim for mail fraud, the plaintiff must state with particularity not only the false statement of fact made by the defendant, but also that he relied upon such false statement of fact. 819 F.2d at 152.

[12]During the period out of which this case arises, St. Thomas was attempting to establish a law school. In order to receive accreditation, St. Thomas had to subject its financial records to scrutiny by the American Bar Association. Plaintiffs contend that the defendants mailed distorted financial statements to the American Bar Association, and that the Association relied upon them.

The court in Pujol also reasoned that because Pujol was not a target of any of the acts pleaded as predicate acts in the RICO claim, he lacked standing to sue under civil RICO. In other words, Pujol, like the plaintiffs here, was not a person at which the predicate act was directed.

III. CONCLUSION

Because we agree with the district court's conclusion that Count II does not sufficiently allege a RICO conspiracy claim and the district court's conclusion that Count I does not demonstrate that the plaintiffs have standing to assert a substantive RICO claim, the judgment is

AFFIRMED.

CONCUR:

ANDERSON, Circuit Judge, concurring specially:

As indicated by the majority in this case, Morast v. Lance, 807 F.2d 926 (11th Cir.), held that the discharge of an employee in retaliation for reporting activity which is illegal under RICO (18 U.S.C. 1964) does not flow directly from the RICO violation, and thus the discharged employee cannot maintain a civil RICO action. I agree with the majority that there is no principled distinction between that and the instant claim that plaintiffs were discharged for refusing to participate in the illegal acts. Because I doubt that Morast and the result in this case are faithful to Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 & n. 15, 105 S.Ct. 3275, 3285 & n. 15, 87 L.Ed.2d 346 (1985), I concur in the result only.

STATUTES INVOLVED

TITLE 18 - CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 96. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

§ 1961. Definitions

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relative to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to

obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251-2252 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment,

buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business

of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the

investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code § 2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engages in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise

which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law-

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any-

(A) interest in;
(B) security of;
(C) claim against; or
(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962. The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes-

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States,

unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section-

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that-

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest posssible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited

upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him.

Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to-

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter. Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the

disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may-

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the

taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition.

The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee. (m) If any of the property described in subsection (a), as a result of any act or omission of the defendant

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party; (3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;
the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including,

but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons. (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. (d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is

shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon

receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or seperation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of

the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the material so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

Supreme Court
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No. 89-1689

In The

Supreme Court of the United States

October Term, 1989

JOHN P. O'MALLEY and JAMES A. NESBITT,

Petitioners,

vs.

FATHER PATRICK H. O'NEILL, et al.,

Respondents.

BRIEF OF RESPONDENTS ST. THOMAS UNIVERSITY, J. PEPE FANJUL, KENNETH J. WHITTAKER AND THE NON-AUGUSTINIAN TRUSTEES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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May 17, 1990

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QUESTION PRESENTED FOR REVIEW

WHETHER A TERMINATION OF EMPLOYMENT FOR REFUSAL TO PARTICIPATE IN A PATTERN OF RACKETEERING IS ACTIONABLE UNDER THE RICO STATUTE, AND IF SO, WHETHER A REVERSAL OF THE APPELLATE COURT'S DECISION AS TO RESPONDENTS ST. THOMAS UNIVERSITY, J. PEPE FANJUL, KENNETH J. WHITTAKER, AND THE NON-AUGUSTINIAN TRUSTEES IS REQUIRED.

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The instant brief is filed on behalf of respondents St. Thomas University, J. Pepe Fanjul, Kenneth Whittaker, and the non-Augustinian trustees, all of whom were defendants and appellees below.[1] The above-named

[1] Appellees J. Pepe Fanjul and Kenneth Whittaker are both non-Augustinian trustees of St. Thomas University, but were sued both individually and as trustees. All of the other appellees who are non-Augustinian trustees were sued only as trustees, and not individually, and are referred to herein collectively

(Continued on following page)

respondents respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case. That decision is reported at 887 F.2d 1557, and is reprinted at pp. 11-26 of the petitioner's appendix ("App.").

STATEMENT OF THE CASE

We have no quarrel with the petitioners' general statement of the case (Pet. 3-7), except to point out that the petitioners' lengthy quotation from the appellate court's opinion (Pet. 3-4) is not a summary or ratification of any factual finding, but only a summary of "the plaintiffs' claims . . . " (App. 13). As the court of appeals put it, "[w]hile we assume these allegations to be true for the purposes of this appeal, they are hotly disputed by the defendants" (App. 14 n.4).

We should also emphasize the petitioners' omission of any reference to the independent basis for the appellate court's affirmance of the judgment entered on behalf

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(Continued from previous page)

as the non-Augustinian trustees. They are Doug Adams, Ken Jenning, Ken Lawrence, Nicholas H. Morley, Dr. Ricardo Pines, and Evelyn Poole. Two of the university's Augustinian trustees were also defendants and appellees below, Reverend Father John E. Deegan, OSA, and Reverend Father John E. Driscoll, OSA, and are represented by other counsel in this proceeding. Respondent Patrick H. O'Neill, the former president of St. Thomas University, who was also a defendant and appellee below, also is represented by separate counsel.

of respondents St. Thomas University, J. Pepe Fanjul, Kenneth J. Whittaker and the non-Augustinian trustees. Although the court of appeals' central inquiry was devoted to the question presented by the petitioner – whether a termination of employment for refusal to participate in a pattern of racketeering is actionable under the RICO statute – and although the court of appeals' resolution of that question required affirmance of the judgments entered on behalf of the University, Fanjul, Whittaker and the non-Augustinian trustees, the court of appeals' opinion recognizes a wholly-independent basis for affirmance.

As the opinion notes (App. 15), although Count I of the complaint charged respondent Father O'Neill with a substantive violation of 18 U.S.C. § 1962(c) (RICO), it charged the University, O'Neill, Fanjul and the non-Augustinian trustees only in Count II, and only for a RICO conspiracy, in violation of 18 U.S.C. § 1962(d). On that count, even apart from its substantive conclusion about the conduct alleged in Count I (which of course was a predicate for the conspiracy alleged in Count II), the appellate court had no trouble affirming (App. 16):

> Count II need not detain us long. The district court dismissed Count II – the RICO conspiracy count – because the allegations of a conspiracy were merely conclusory and unsupported by any factual allegations. [Citations omitted]. We find that dismissal to be proper. The plaintiffs' complaint and RICO Case Statement allege at most that some of the defendants knew about O'Neill's activities; there are no facts alleged that would indicate that they were willing participants in a conspiracy. [Citations

> omitted]. Thus, there is no palpable conspiracy claim.

This conclusion by the court of appeals ratified the district court's independent conclusion on the conspiracy count (App. 8):

> Plaintiffs assert in Count II (RICO Conspiracy) that St. Thomas University, and trustees, Fanjul and Whittaker, conspired with Father O'Neill to commit violations of the Federal RICO Act. For any of these Defendants to be charged with RICO conspiracy, however, there must be some substantive RICO violation that they conspired to commit. In other words, the RICO conspirators must have agreed to participate in the commission of two predicate acts of mail fraud. [Citation omitted]. Plaintiffs have not alleged that these Defendants agreed to participate in the commission of mail fraud; what they do allege is that each of these Defendants "adopted the unlawful acts of the others as their own." These allegations are insufficient to show that both a conspiracy existed and that the actions at issue were taken in furtherance of that conspiracy. [Citation omitted]. The mere conclusory allegation of a conspiracy with no supporting factual averments is insufficient to state a claim for conspiracy. [Citation omitted]. Accordingly, this Count is also dismissed.

ARGUMENT

In their petition, the petitioners have made no mention of the independent basis upon which the district court dismissed the conspiracy count against the University, Fanjul, Whittaker and the non-Augustinian trustees, and no mention of the Court of Appeals' endorsement of

that independent basis for dismissal. Accordingly, no such argument is before the Court. *See Mazer v. Stein*, 347 U.S. 201, 206 n.5 (1954); *Irvine v. California*, 347 U.S. 128, 129 (1954). Therefore, even if the Court were to address the single question presented by the petitioners, and even if the Court were to disagree with the court of appeals' conclusion on that question, such disagreement would provide an insufficient basis for overturning the court of appeals' affirmance of the district court's dismissal of the action brought against the University, Fanjul, Whittaker, and the non-Augustinian trustees. For this reason, as to those respondents, the petition should be denied.

Of course, the court of appeals' primary substantive conclusion – that the petitioners lacked standing to prosecute their RICO action because they had not alleged that they had been injured by reason of a violation of § 1962 – also provided an independent basis for affirming dismissal of the conspiracy count against the University, Fanjul, Whittaker and the non-Augustinian trustees. On this point, to avoid repetition, we will rely upon the court of appeals' reasoning (App. 16-26), and upon the brief in opposition to be filed by respondent Patrick H. O'Neill.

In addition, we would note that, although the petitioners did allege generally that they had been fired for refusing to participate in the alleged RICO scheme, they offered no such allegation with the requisite particularity – a point which the court of appeals found it unnecessary to reach (App. 18). To the contrary, the petitioners described only one specific incident in which only one of them (Nesbitt) had allegedly refused to unlawfully enroll a foreign student in the University, but they failed to allege that Nesbitt was fired on the basis of that single

incident. And no incidents at all were alleged regarding petitioner O'Malley. At most, the complaint and the RICO statement suggested that the petitioners were fired because they threatened to blow the whistle – an allegation which unquestionably fails to constitute a cognizable racketeering injury.

Moreover, even if the petitioners had alleged their cause of action with the requisite specificity, the court of appeals was right to hold that such an allegation is not sufficient to confer standing under RICO. And beyond that, our primary point is that the court of appeals' opinion must be affirmed as to the University, Fanjul, Whittaker and the non-Augustinian trustees, regardless of the ultimate disposition of this point.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH JUDICIAL CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER A TERMINATION OF EMPLOYMENT FOR REFUSAL TO PARTICIPATE IN A PATTERN OF RACKETEERING IS ACTIONABLE UNDER THE RICO STATUTE

LIST OF PARTIES

Plaintiffs:

John P. O'Malley
James A. Nesbitt

Defendants:

Father Patrick H. O'Neill
St. Thomas University, Inc.
J. Pepe Fanjul
Kenneth Whittaker
Doug Adams
John Allen, M.D.
Jerome Blank
The Reverend Thomas Bogardus, O.S.A.
Mike Cameron
Alice Carney
Christina De Heron Noble
The Reverend John E. Deegan, O.S.A.
The Reverend John M. Driscoll, O.S.A.
The Very Reverend Joseph Duffey, O.S.A.
Ken Jenne
Ken Laurence
Irma Baker Lyons
Eugene F. Malon
Nicolas H. Morley
The Reverend William Murray, O.S.A.
Dr. Ricardo Pines
Ken Plante
Evelyn Poole
The Reverend Michael Scanlon, O.S.A.
Martin Taplin

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The opinion of the Court of Appeals is reported: *O'Malley v. O'Neill,* 887 F.2d 1557 (11th Cir. 1989). The opinion of the District Court is not reported. Both opinions are included in Petitioners' Appendix.

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GROUNDS ON WHICH JURISDICTION IS INVOKED

The Court of Appeals entered the judgment which Petitioners seek to review on November 14, 1989, and denied a petition for rehearing and a suggestion for rehearing en banc on January 25, 1990. This Court's jurisdiction has been invoked pursuant to 28 U.S.C. Section 1254 (1982).

STATUTES INVOLVED

Petitioners filed suit for damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Section 1961, et seq. (1982), the text of which is reproduced in Petitioners' Appendix.

REASONS FOR DENYING THE WRIT

Petitioners have asked this Court to exercise its discretionary jurisdiction based upon what Petitioners perceive to be a conflict between the decision of the Eleventh Circuit Court of Appeals in the instant case and decisions issuing from this Court and various other circuit courts of appeal. The scope of this Court's certiorari jurisdiction is narrow. A purported conflict must truly be direct, and must be readily apparent from the lower court's rationale or result. *United States v. Dowe*, 465 U.S. 605, 610 (1984); *Lugar v. Edmundson Oil Company*, 457 U.S. 922, 926 (1982); *Army and Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982); *Henderson v. Kibbe*, 431 U.S. 145, 152 (1977). As Respondent will explain, the conflict which is necessary to justify an exercise of certiorari jurisdiction simply does not exist in this instance.

Contrary to Petitioners' assertion, the holding of the Court of Appeals is entirely consistent with this Court's decision in *Sedima S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479 (1985). The Eleventh Circuit's conclusion, i.e., that Plaintiffs were unable to state a claim upon which relief could be granted to the extent that they failed to demonstrate that they had been injured by the alleged acts of mail fraud, is entirely consistent with the holding in *Sedima*, that "the plaintiff only has standing if, and can only recover to the extent that, *he has been injured* in his business or property *by the conduct constituting the violation.*" 473 U.S. at 496. (Emphasis added.)

The language that this Court chose to utilize in enunciating this standard is critical. The *Sedima* Court

specifically provided that a RICO injury must have been caused *by the conduct constituting the violation.* This holding is merely a restatement of the civil remedies portion of the RICO statute itself, which authorizes a civil suit by "*any person injured* in his business or property *by reason of a violation of section 1962* . . . ." 18 U.S.C. Section 1964.

As the Eleventh Circuit observed, neither in their complaint nor in their RICO case statement did the Plaintiffs claim that they had been injured by the alleged acts of mail fraud. Rather, Petitioners specifically alleged that their injury arose when they were terminated as a result of their refusal to participate in or conceal the fraudulent scheme.

In its opinion, the Eleventh Circuit recounted the allegations before it in the light most favorable to the Plaintiffs.

> O'Malley and Nesbitt discovered that St. Thomas University was operating at a deficit and that O'Neill was concealing its true financial condition through various means. In the course of preparing a budget proposal for the 1986-1987 school year, the plaintiffs learned that O'Neill was concealing a deficit by using restricted federal student assistance to offset St. Thomas' operating expenses; and that he was obtaining Federal government and private grants requiring matching funds when St. Thomas had no matching funds available. Further, they learned that O'Neill distorted St. Thomas' financial statements by basing budget projections on non-existent pledges of financial support. In addition, O'Neill permitted foreign students to attend St. Thomas without visas required by Federal law. On one occasion O'Neill asked Nesbitt to send a false verification form to the immigration and naturalization service, but Nesbitt refused.

> In August of 1986, O'Malley and Nesbitt confronted O'Neill and urged him to make a full disclosure of the true financial condition of St. Thomas. O'Neill refused to do so, however, and insisted that he would make up the difference through his own fund raising efforts.
>
> After repeated confrontations between plaintiffs and O'Neill over management of St. Thomas, O'Neill sent a letter to O'Malley demanding his resignation. On October 3, 1986, O'Neill terminated Nesbitt. On the same date, at the request of O'Neill, the board of trustees, acting through defendants J. Pepe Fanjul and Kenneth Whittaker, again informed O'Malley that he must resign by October 5, 1986 or be terminated. When he refused to submit his resignation, he was terminated.[1]

The court noted that the only predicate acts upon which the Plaintiffs based their RICO claims were alleged acts of mail fraud under 18 U.S.C. Section 1341 (1982).

Based upon the Plaintiffs' own pleadings, it is clear that the proximate cause of their alleged injury was *not* the mail fraud scheme itself. Rather, any injury to the Plaintiffs was caused by the termination of their employment. Therefore, the conduct which constituted the predicate act violation did not actually injure the Plaintiffs. Further, the connection between the Plaintiffs' alleged termination as a result of their refusal to participate in the "scheme" and the predicate acts themselves is entirely too tenuous to establish a basis for RICO liability.

Accepting Plaintiffs' allegations as true, Plaintiffs have established two separate series of tortious acts which were committed by Defendant O'Neill. The first set consists of

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[1]As the Eleventh Circuit noted in its opinion, while the court assumed the allegations to be true for purposes of the appeal, these allegations have been "hotly disputed by the defendants."

the predicate act of mail fraud which was purportedly committed by Father O'Neill. The second set of tortious acts involved the termination of O'Malley and Nesbitt by the Defendants. While the Plaintiffs presumably can demonstrate injury as a result of the second set of tortious acts, i.e., their termination, they cannot establish injury solely as a result of the predicate act of mail fraud. In other words, had the Plaintiffs not been terminated, Plaintiffs would have suffered no recognizable injury even had the alleged mail fraud continued. Plaintiffs were injured only when and because they were terminated.

Petitioners have attempted to improperly characterize this Court's holding in *Sedima* through a strained, out-of-context reference to a limited portion of the opinion of the Court of Appeal, rather than through direct citation to this Court's opinion in *Sedima*. Specifically, Petitioners have stated that: "This Court instead recognized that, to borrow the Court of Appeals' phrase here, there is 'no principled difference' between 'direct injury' and 'indirect injury.'" Petitioners' characterization totally misinterprets this Court's actual holding in *Sedima*, and does not otherwise properly characterize the holding of the Eleventh Circuit.

This Court did not conclude in *Sedima* that there was no real difference between direct injury and indirect injury, as far as the RICO Statutes are concerned; rather, the Court simply noted that there is no requirement that the complaining party demonstrate a "racketeering injury" which is separate and apart from any injury that was caused by the predicate acts themselves.

In this instance, the Eleventh Circuit did not disallow the Plaintiffs' claim based upon the perception that there had to be an injury to the complaining parties that could truly be characterized as a "racketeering injury," in addition to or in place of an injury that directly flowed from the predicate acts themselves. Nor did the court feel that it was necessary to artificially distinguish between direct and

indirect injury. Rather, the Court simply concluded that Petitioners' injury did not have the requisite causal nexus with the predicate acts to establish a viable RICO claim.

The Statute at issue, 18 U.S.C. Section 1964(c) (1982), reads as follows:

> Any person *injured in his business or property by reason of a violation of section 1962* of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee (emphasis added).

Thus, in order to have standing to sue for damages under section 1964(c) the plaintiffs must show: (1) a violation of section 1962; (2) injury to business or property; and (3) that the violation caused the injury. *See Haroco v. American Bank and Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), aff'd, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985). We assume that discharge from employment constitutes an injury to "business or property." *Nodine v. Textron, Inc.*, 819 F.2d 347, 348 (1st Cir. 1987). We also assume that the complaint sufficiently alleges predicate acts of mail fraud, and focus our attention on the issues of standing and causation.

Section 1964(c) itself provides little guidance as to the precise meaning of the words "by reason of." However, the Supreme Court, in *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), discussed this requirement. The *Sedima* Court concluded that 'the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or

> property by the conduct constituting the violation.' 473 U.S. at 496, 105 S.Ct. at 3285. In other words, 'the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern. . . . Any recoverable damages occurring by reason of a violation of Section 1962(c) will flow from the commission of the predicate acts.' 473 U.S. at 497, 105 S.Ct. at 3285. The language 'by reason of' in section 1964(c) imposes a proximate causation requirement on the plaintiffs. *O'Malley v. O'Neil*, 887 F.2d. at 1561.

In fact, Petitioners cannot reasonably suggest that they suffered even an indirect injury *as a result of the predicate acts*.

Petitioners cite to the Eighth Circuit's decision in *Alexander Grant and Company v. Tiffany Industries, Inc.*, 749 F.2d 408 (8th Cir. 1984), vacated, 473 U.S. 922 (1985) (for reconsideration in light of *Sedima*), *on remand*, 770 F.2d 717 (8th Cir. 1985) (adhering to original result), *cert denied*, 474 U.S. 1058 (1986), as authority for the proposition that a direct injury solely from predicate acts is *not* required in order to establish a RICO claim. Respondent would submit that the question of direct versus indirect injury is not dispositive of the issues that were raised in this matter. To the contrary, while the Eleventh Circuit certainly noted in its opinion that some courts "have held that indirect injury is sufficient to confer standing," *O'Malley v. O'Neill*, 887 F.2d at 1561, n.6, the court focused on the Plaintiffs' inability to establish a "causal nexus between the predicate acts and the loss of their jobs."

Petitioners maintain that *Tiffany* is consistent with *Sedima*. Respondent agrees with that assessment, to the extent that it is clear from a review of the Eighth Circuit's decision upon remand that the court recognized that there must necessarily be a causal relationship between a RICO predicate act and the injuries which are at issue before a

claim may be properly stated under Section 1961(c). However, in that regard, the *Tiffany* decision is entirely consistent with the Eleventh Circuit's opinion in this matter.

In its original decision in *Tiffany*, the Eighth Circuit concluded that Grant had been injured by the acts of mail and wire fraud that had been committed by Tiffany, and that it had suffered an injury "by reason of" Tiffany's alleged violation of Section 1962(c). However, the Eighth Circuit felt that the plaintiff had failed to allege "some type of 'racketeering enterprise injury,'" which the Court deemed to be a necessary component of a RICO claim. In *Sedima*, this Court made it clear that the so-called "racketeering injury" was not in fact required in order to state a civil RICO claim. Nevertheless, on remand, the Eighth Circuit concluded that the plaintiff still had standing to maintain a RICO action against Tiffany, since Grant had alleged that it had been injured "by reason of" a violation of Section 1962.

The holding of the Eighth Circuit in the second *Tiffany* decision is wholly consistent with *Sedima* and with the decision of the Eleventh Circuit Court of Appeals in this case. The distinction between *Tiffany* and *O'Malley* is factual. Simply put, the plaintiffs in *Tiffany* sustained an injury as a result of the predicate acts of mail fraud; the Plaintiffs in the instant case did not.

The allegations which Grant made against Tiffany were as follows:

> The first allegation is that Kahn, in an effort to inflate the value of Tiffany inventory, falsely represented to Grant that Steelabrade Corporation, a supplier of products to Tiffany, held $500,000 worth of Tiffany inventory as of March, 1978. Grant requested confirmation of this claim from Steelabrade president James Murphy. Kahn and Martin, knowing Murphy would not comply, instead requested that he compile a schedule of all

purchases of Steelabrade products by Tiffany during 1977. The two then attached a copy of Grant's confirmation request to the schedule and fraudulently inserted language above Murphy's signature stating that "[t]his inventory was at our premises at December 31, 1977, and March 1, 1978." These documents were then mailed to Grant.

Grant's second claim of fraud concerns an alleged sale of $3,500,000 worth of Tiffany products to the government of Nigeria. Grant learned through the course of its audit that a substantial portion of the products sold had not yet been purchased by Tiffany. Grant questioned whether Tiffany could, under these circumstances, record in its financial statements the substantial earnings resulting from this sale. In response, Tiffany personnel stated that the sale should be certified because they had issued purchase orders for the products as of June 30, 1977, and that the products were held by ten suppliers who were simply awaiting further shipping instructions. Grant requested confirmation of this claim from the ten suppliers. Kahn and Martin backdated purchase orders and mailed to Grant forged letters from the suppliers confirming the representations made by Tiffany personnel. Grant, still apprehensive, sought "reconfirmation" of the same information. Kahn and Martin then pressured six suppliers to sign and mail reconfirmation letters back to Grant. 742 F.2d at 409-410.

Grant alleged that it had suffered a theft of services as a result of these and other acts of mail fraud, in that the fraud required it to spend substantially more time on the Tiffany audit than would have otherwise been necessary. This caused a commensurate increase in fees, and none of those fees had been paid. Grant further contended that the

resulting SEC investigation (which was initiated when Grant reported its concerns to the SEC) caused it to incur extensive attorney's fees and other expenses. Grant finally maintained that the fraud had damaged its reputation as a national independent public accounting firm. 770 F.2d at 719.

Clearly, therefore, Grant was injured "by reason of" the predicate act of mail fraud. Grant's claim was *not* based solely upon the suggestion that Grant had been injured when Tiffany terminated its use of Grant's services, after Grant "blew the whistle" on Tiffany's mail fraud.[2]

In this case, Petitioners cannot claim that they were injured "by reason of" the predicate acts. Petitioners' injuries, if any, stem from what they characterize as a retaliatory termination, which was arguably related to their failure to participate in the so-called RICO scheme.[3]

Respondent does not dispute that Petitioners would have a cause of action for RICO violations if "retaliatory termination" was among those predicate acts that are delineated in 18 U.S.C. Sections 1961 and 1962. However, retaliatory firing is not among those predicate acts that are included within the statute. Mail fraud is.

Petitioners further argue that the Eleventh Circuit's decision is in conflict with the Eighth Circuit's decision in *Terre Du Lac Association, Inc. v. Terre Du Lac, Inc.*, 772

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[2]Moreover, Grant actually alleged that Tiffany had directed certain fraudulent documents specifically to Grant, as part of its mail fraud scheme.

[3]In fact, Petitioners only alleged a single incident (involving Nesbitt) where they had refused to "participate" in the scheme. That incident involved Father O'Malley's request that Mr. Nesbitt enroll a foreign student who did not have the appropriate visa. Petitioners did not claim that either was fired because of this incident. Rather, they simply claimed in conclusory fashion that they were fired because they "refused to participate in or continue to conceal these wrongful acts."

F.2d 467 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S.Ct. 1460, 89 L.Ed.2d 718 (1986) and the Second Circuit's decision in *Sperber v. Boesky*, 849 F.2d 60 (2nd Cir. 1988). Both of those cases allowed recovery by individuals who were not the *target* of the predicate acts, but who were nonetheless injured by those acts, albeit indirectly.

In *Terre Du Lac*, the plaintiff landowner's association alleged that the defendants' acts of mail fraud injured the association by causing an increase in the cost of maintaining roads in the *Terre Du Lac* subdivision. Those costs allegedly increased because the defendants invested money which they had obtained from the mail fraud in their own operations, rather than using the money to improve the subdivision roads, and because the mail fraud scheme caused more lots to be sold, resulting in more roads and greater usage of those roads, which had to be maintained. Thus, while the association did not assert that it was the target of the mail fraud itself, it did allege that it had sustained damage as a direct result of the mail fraud, and *not* as a result of some second set of tortious acts.

The decision of the Second Circuit Court of Appeals in *Sperber* is enlightening, particularly, given its discussion of this court's holding in *Sedima*.

> The leading case dealing with the "by reason of" language of RICO is *Sedima*, which held that damages caused directly by the predicate acts of a RICO violation are recoverable. It did not focus on the issue raised by this appeal: to what extent are damages caused only indirectly by the predicate acts recoverable? (By damages caused only "indirectly," we mean "racketeering" injury, "competitive" injury or injury caused by the total effect of the pattern of racketeering in the enterprise.) *Sperber*, *supra* at 63.

The court then observed that regardless of whether the standard for recovery requires direct or indirect damage from the predicate act, the plaintiffs had been unable to demonstrate the requisite causal nexus to sustain a RICO claim.

Utilizing the Second Circuit's definition of what constitutes an indirect injury, it is clear that the injury which is being claimed by Petitioners in this matter does not qualify as a compensable claim under RICO. The injury which Petitioners claim cannot be considered as either a "racketeering injury," or a "competitive injury." Nor was this injury caused by the total effect of the pattern of racketeering which was involved in the enterprise. Rather, Petitioners seek to recover for an injury which resulted solely from their termination.

Petitioners fail to comprehend that their case is not like *Sedima, Tiffany, Terre Du Lac* or *Sperber*. In all of those cases, there was one set of tortious acts — the predicate acts — which gave rise to the RICO claim. It was that set of tortious acts which caused injury to the plaintiffs in those cases, directly or indirectly.

In this case, there were in effect two sets of tortious acts. The first set of tortious acts consisted of the alleged incidents of mail fraud; those constituted the requisite predicate acts which could give rise to a RICO claim. Petitioners suffered no injury — either direct or indirect — as a result of those acts.

The second set of tortious acts involved the termination of Petitioners O'Malley and Nesbitt. Petitioners did suffer a very direct injury from the second set of tortious acts. Those acts, however, cannot be considered predicate acts under 18 U.S.C. Section 1964, and in no way gave rise to a RICO claim.

The decision of the Eleventh Circuit Court of Appeals in this case does *not* conflict with this Court's decision in

Sedima, or with any of the circuit court decisions that have been cited by Petitioners. Any apparent conflict disappears when the facts of the various cases are analyzed closely. No basis therefore exists for this Court to accept jurisdiction in this matter to reconsider those issues which were properly resolved by the Eleventh Circuit. Nor do those issues require reconsideration, given the Eleventh Circuit's faithful adherence both to this Court's decision in *Sedima*, and to the express language of 18 U.S.C. Section 1964(c) (1982).

CONCLUSION

This Court should deny certiorari.

Respectfully submitted,

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